UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS INC.; SONY BMG MUSIC ENTERTAINMENT; ARISTA RECORDS LLC; INTERSCOPE RECORDS; WARNER BROS. RECORDS INC.; and **UMG RECORDINGS INC.**, *Plaintiffs*, v. **JAMMIE THOMAS**, *Defendant*.	Case No. 06-cv-1497 (MJD/RLE) JURY DEMANDED

RESPONSE TO MOTION IN LIMINE TO PRECLUDE DEFENDANT FROM RAISING OR ASSERTING EVIDENCE OF OTHER LAWSUITS

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Dated: June 4, 2009

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This motion has a pleasing irony. Plaintiffs contend that evidence of the litigation campaign that they have been conducting around the country — and that they trumpet on their web site, in their public statements, and in the press — should be excluded as unduly prejudicial. *See* M. at 3–5. They think, as we think, that things would go badly for them if the jury knew what they were up to. The decision might even be "an emotional one." M. at 3. Unfortunately for them, "objection — damaging" appears nowhere in the rules; that the part of the story that we wish to present damns the RIAA is no basis for excluding it.

We want to tell the jury what's been going on:

- The RIAA has prosecuted more than 35,000 people, most of them without counsel. It has threatened them with actions for copyright infringement in federal court with a potential statutory-damages judgment of millions of dollars if they are convicted.
- The RIAA has relied almost exclusively on evidence collected by MediaSentry in violation of state and federal laws against wiretapping and unlicensed detective work and collected in violation of the rules of professional conduct governing lawyers.
- The RIAA has received more than $100M in settlements as a result of its litigation campaign. And it has received this money even though the claims that it threatens are often legally baseless. In particular, but without limitation:
    - The statutory damages that the RIAA seeks are unconstitutional because they are grossly excessive: $150,000 for a song that sells for 90 cents or $1.29 on iTunes without DRM.
    - The copyright registrations on which the RIAA is suing are defective because the registered works are not "works for hire" — an argument that we will present formally in a motion to dismiss for lack of standing under Rule 12(b)(1) on Monday.
    - The evidence on which the RIAA obtains is inadmissible because obtained in violation of the rights of third parties and, hence, in violation of the rules of professional conduct.

- The RIAA has repeatedly prosecuted innocents. When threatened with an adverse ruling on a legal issue, the RIAA has repeatedly attempted to pull the plug, thereby avoiding legal determinations that would have affected its many other cases and could have undermined its litigation campaign as a whole.
- If the RIAA's position is correct — that downloading or sharing music files over the Internet is willful copyright infringement — then the RIAA could go after individuals not just for seven-figure judgments, as in this case, but for $150,000 per song — or a quarter of a billion dollars in this case, based on the more than 1700 songs that the RIAA claims to have discovered o Jammie's computer.

This is the first case in which a jury will be asked to legitimate the RIAA's litigation campaign. One can be sure that the RIAA, just as they did after the first trial in this case, will hold up a jury verdict on their side as legitimizing their campaign against those who download and share music online. That is what the RIAA is after, not any money that they might collect from Jammie. And if that is what they seek in reality, then Jammie should be allowed to defend herself on the same terms. The question for the jury is — is this what copyright infringement, and the federal courts, are for?

This question comes before the jury in at least two ways: first, the jury must determine whether Jammie's acts, if proved, constitute fair use; second, the jury must determine what amount of statutory damages is appropriate. As the Supreme Court has explained, the list of statutory factors in § 107, the statutory recognition of the fair-use doctrine, is illustrative, not exhaustive. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577–78 (1994). The real-world consequences, including, importantly, the litigation brought by the RIAA for the very acts at issue in this case, of determining whether what Jammie stands accused of is fair use are relevant to the jury's determination of the scope of fair — the scope of uses to which the penalties imposed by the Copyright Act do not apply.

Similarly, the RIAA's litigation campaign against those accused of downloading and sharing music online is relevant to determining what amount of statutory damages is appropriate. One relevant factor is the harm to the recording industry should acts like those of which Jammie stands accused be, as they are, widespread. This harm has been in large part compensated for by the more than $100M that the recording industry has already collected in settlements. Indeed, the very fact that what Jammie is accused of doing is widespread — that it is normal for a whole generation of Americans — is relevant to determining the degree to which Jammie should be punished for engaging in it. The jury cannot fairly determine what damages are "appropriate" without hearing the whole story as told by competing advocates.

The RIAA has gone for five years saying one thing to the public and another thing in the courts. They say they have been reasonable with defendants in these cases; in fact, they have extracted more than $100M by threatening millions of dollars of liability after a prolonged and expensive federal process. They claim they have ironclad evidence of downloading; in fact, their evidence is illegal and inadmissible. They claim great damage to the recording industry from the advent of peer-to-peer music systems; in fact, these have spurred profitable innovation in the industry.

Let us ask the jury the question for which the RIAA will use their verdict as an answer, an answer on behalf of the whole federal judicial process: was the RIAA's litigation campaign the right response?

Respectfully submitted,

/s/ K.A.D. Camara

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